

NEW YORK COURT OF APPEALS ROUNDUP:

MUNICIPAL (NON)LIABILITY FOR BREACH OF DUTY, EQUITABLE ESTOPPEL
AND THE STATUTE OF LIMITATIONS, AND THE CONFRONTATION CLAUSE

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Governor Eliot L. Spitzer has nominated the Honorable Theodore T. Jones, Jr. to fill the vacancy on the Court of Appeals created by the retirement of Judge Albert M. Rosenblatt. Justice Jones (62), a graduate of St. John's University School of Law, has been a Kings County Supreme Court Justice since 1990, and is also the Civil Administrative Judge of that Court. If the nomination is confirmed, the Court will again have an African-American member, which it has not had since the expiration of Judge George Bundy Smith's term last September.

We discuss below three recent decisions of the Court of Appeals. The first, arising out of New York City's slow response to a 911 call, established that the "special relationship" exception to the general rule of municipal non-liability for breach of duty may be invoked only in rare circumstances. The second, in a medical malpractice case, confirmed that the doctrine of equitable estoppel as a defense to a statute of limitations motion also is available only in limited situations. The third, in a criminal case, demonstrated that a confrontation clause determination as to whether an out-of-court statement by an unavailable declarant is "testimonial," is a fact-specific inquiry requiring examination of the circumstances in which the statement was made.

Municipal Liability

The clear guidance of *Laratro v. City of New York*, is that courts should construe very narrowly the "special relationship" exception to the general rule of municipal non-liability for breach of duty. Judge Robert S. Smith's opinion for a unanimous Court explained that such strict approach is consistent with the rationale of the rule, namely that if municipalities were held liable every time their failure to carry out their duties caused injury, the cost would be excessive, useful activity might be deterred, and governments would be rendered "less, not more, effective in protecting their citizens."

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The unfortunate facts of the case arose out of plaintiff suffering a stroke while in his office. A co-worker, who was also a friend of the plaintiff, dialed 911, and was told by the operator that an ambulance would be at the scene “as soon as possible.” The ambulance did not arrive for 35 minutes, however, and the delay in treatment allegedly worsened plaintiff’s brain damage from the stroke. It further was alleged that help was slow to arrive because the 911 operator had negligently failed to convey the urgency of the situation. The co-worker testified that, had she known the ambulance would take so long, she would have arranged for alternative and faster transportation to the hospital.

The Supreme Court granted New York City’s motion for summary judgment. The Appellate Division, First Department (4-1), reversed, finding that there were issues of fact as to whether plaintiff could satisfy the elements of the “special relationship” test set forth in *Cuffy v. City of New York*, 69 N.Y.2d 255 (1987). The Court of Appeals found that the Supreme Court’s summary judgment order should be reinstated.

Cuffy set forth four factors, each of which must be present, for there to exist such a relationship between a municipality and an injured party that the municipality may be held liable for breach of duty: (1) assumption, “through promises or actions,” of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of the municipality’s agents that inaction could lead to harm; (3) “some form of direct contact” between the municipality’s agents and the injured party; and (4) that party’s justifiable reliance on the municipality’s “affirmative undertaking.” *Id.* at 260.

The Appellate Division was of the view that Cuffy should not be applied in an “overly rigid manner,” and that when a third party communicates with a municipality on behalf of an injured party, a fact-specific assessment of the relationship between those two individuals should be undertaken in order to determine whether the third and fourth elements of the test are satisfied. The Court of Appeals disagreed that there was any genuine issue of material fact. If an “immediate family” member has direct contact with a municipality and justifiably relies on its undertaking, that contact and reliance may be imputed to the injured party, but contact and reliance by a friend or person standing in close proximity to the injured party may not be so imputed, as a matter of law.

The Appellate Division had noted that the City did not contest that the first two elements of the Cuffy test were met by the facts alleged. The Court of Appeals hinted that the concession may have been too readily made, however, by pointing out that, because of its holding on the third and fourth prongs of the test, it was unnecessary for the Court to reach the question of whether a statement that an ambulance will be there “as soon as possible,” is “specific enough” to meet the first prong – assumption of an affirmative duty to act.

Equitable Tolling

Judge Carmen Beauchamp Ciparick authored the opinion of the unanimous Court in *Putter v. North Shore University Hospital*, in which the Court found that the doctrine of equitable estoppel was unavailable to the plaintiff, as a matter of law, and that the Supreme

Court had properly dismissed the complaint without granting further discovery. A defendant will not be equitably estopped from asserting a statute of limitations defense merely because it engaged in wrongdoing, the decision makes clear. Rather, there must be a causal connection between the wrongdoing and the plaintiff's delay in commencing an action, for example reliance on misrepresentations, but any such reliance must have been reasonable.

Plaintiff underwent bypass surgery in 1993, performed by Dr. Michael Hall at North Shore University Hospital. Several weeks later, he was diagnosed with hepatitis-C. Plaintiff's primary care doctor and his sons, two doctors and a physician's assistant, all advised him that he likely had contracted the disease during either the surgery or the hospitalization for it. Plaintiff did not attempt to speak to Dr. Hall. He did contact the chief of infectious diseases at North Shore, and inquired how he could have contracted hepatitis-C (which he had not had prior to the hospitalization), given that he had not been provided with any blood products. Plaintiff's testimony was inconsistent as to whether he had been told by the North Shore representative only that a certain percentage of people contract the disease from "unknown sources," or that plaintiff's case specifically was of unknown origin. In any event, plaintiff neither brought an action at that time, nor investigated the matter further.

Long after the two and one-half year statute of limitations for medical malpractice claims had passed, Plaintiff received a letter from the Department of Health in 2002, advising him that North Shore was under investigation: 10 of its patients, 8 of whom had been operated on by Dr. Hall, had contracted hepatitis-C, and the Hospital had failed to report cases of which it had been aware until after the investigation had begun. Litigation ensued.

A divided panel of the Appellate Division, Second Department, concluded that, although plaintiff had not put forth sufficient evidence to defeat defendants' statute of limitations motion, he should have been granted the opportunity to take further discovery in support of his equitable estoppel claim. The Court of Appeals agreed that equitable estoppel generally is a question of fact. Plaintiff's undisputed level of awareness and subsequent inaction, however, simply could not support his invocation of doctrine.

The Court last year had reaffirmed that a defendant will be precluded from using the statute of limitations defense "where it is the defendant's affirmative wrongdoing . . . which produced the . . . delay" in instituting legal proceedings. Quoting *Zumpano v. Quinn*, 6 N.Y.3d 666, 673 (2006). It stated in *Putter* that equitable estoppel is appropriate where the plaintiff is prevented from timely filing "due to his or her reasonable reliance on deception, fraud or misrepresentations by the defendant." Under the circumstances of this case, any reliance that plaintiff may have placed on the alleged statement by North Shore's infectious disease specialist that his disease was of unknown origin -- particularly because the specialist was a representative of the Hospital in question -- was unreasonable, and certainly did not change the fact that plaintiff already was on notice of sufficient information to at least give rise to a duty to inquire of relevant facts prior to the expiration of the limitations period.

Confrontation Clause

Determination of the issue of whether an out-of-court statement of a witness, unavailable at trial, is “testimonial,” such that its admission would violate a criminal defendant’s Sixth Amendment right of confrontation, will continue to give rise to fact-intensive inquiry. The decision of the Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004), has made it so. That is clear from the unanimous decision of the New York Court of Appeals in *People v. Norman Bradley*. In an opinion by Judge Robert S. Smith, the Court conducted a detailed review of the challenged statement and the circumstances surrounding its utterance, and held that the statement was admissible.

The defendant in *Bradley*, was convicted of criminal contempt and assault. The only witness against him was a police officer who had responded to a 911 call, and found *Bradley*’s girlfriend cut, bleeding, and visibly shaken. At trial, the police officer testified that he had asked the girlfriend what had happened, and that her response was that *Bradley* had thrown her through a glass door. The officer examined the premises, found *Bradley*, and observed a glass door with broken panes, and glass on the floor.

The woman was not available to testify at trial, and the trial judge admitted the police officer’s testimony. The jury convicted *Bradley* and the Appellate Division, First Department, affirmed.

In affirming the Appellate Division, the Court of Appeals reviewed the U.S. Supreme Court’s analysis of the issue of which statements are testimonial, as bearing witness against a defendant in a formal way, and which are more in the nature of excited utterances made in the course of what could be described as emergency circumstances. The Court also reviewed the statements in *Davis v. Washington* and its companion case, *Hammon v. Indiana*, 126 S. Ct. 2266 (2006). The statement in *Davis*, made during a 911 call, was admissible in evidence; the statement in *Hammon*, made during a formal interrogation by police, was not.

Concluding, after a thorough review of the facts, that the statement in *Bradley* was somewhere between those in *Davis* and *Hammon*, the Court held that the statement was not testimonial in nature, and therefore affirmed the conviction.

We suggest that *Bradley* shows that the trial and appellate courts will continue to be required to make individualized, factual analyses to resolve many Sixth Amendment confrontation issues.